

POINT-COUNTERPOINT:  
AFFIRMATIVE ACTION HIRING PRACTICES IN THE NEW COURT ERA

Someone Should Sue

By Roger Clegg\*

Two things that the past few months have proved about the Supreme Court, when it comes to civil rights: five justices insist on interpreting statutory language to mean what it says, and are very, very skeptical about racial and ethnic preferences.

The thesis of this article follows rather directly from this observation: since American companies frequently use employment preferences based on race, ethnicity, or sex, and since these preferences are inconsistent with the text of the Civil Rights statutes, they will likely be struck down. Companies need to rethink them.

First, though, we need to define one term, namely “affirmative action.” Its original meaning was taking positive, proactive steps—affirmative action, get it?—to get rid of discrimination. Another meaning is casting a wide net—recruiting far and wide for the best candidates, not just using an old-boy network. Neither of these kinds of affirmative action is controversial today or raises any legal issues. But that is not true of the use of preferences based on race, ethnicity, or sex—“affirmative discrimination,” as Nathan Glazer aptly termed it. This means that the best qualified people are not being hired and promoted because of their skin color, the country their ancestors came from, or their gender, and this is both unfair and presumptively illegal.

Eight out of ten business executives said that affirmative-action programs had resulted in them giving jobs and promotions to applicants who were less qualified than others, according to a survey conducted ten years ago by Yankelovich Partners, and commissioned by the PBS show “Nightly Business Report.” Things have only gotten worse since then.

It is not difficult to find evidence of corporate preferential treatment. Just visit some corporate websites, or look at their own brochures. The trumpeting of minority numbers is deafening, and it is implausible that this bean-counting does not reflect and encourage the use of quotas and preferences.

Consider Wal-Mart. The company has told its managers that they have “diversity goals,” and that they should avoid discrepancies between the percentage of qualified minorities/females who apply and the percentage actually chosen—or risk losing at least part of their annual bonuses. Thus, if a manager is faced with hiring the most qualified candidate or meeting the diversity goal, she or he knows what to do.

Here is another example. Recently the Center for Equal Opportunity received an e-mail, apparently from one of Intel Corporation’s employees, forwarding a description by Intel of its “Diversity Employee Referral Program.” The gist is that Intel will pay a \$6,000 bonus to employees who make successful hiring referrals of “women, African Americans, Hispanics

and Native Americans,” but only \$2,000 for successful hiring referrals of anyone else, *i.e.*, men who are of European, Asian, or Middle Eastern background.

One employee of a large Fortune 500 company contacted the Center when the company announced (internally only, of course) that when managers were hiring interns, if they hired three, one had to be female, one a minority, and one a “top performer.” (Note the soft bigotry of low expectations.)

According to an October 17, 2005 article in *Newsweek* about Xerox, “Managers are judged—and compensated—on meeting diversity goals.” The article indicates that the company’s CEO, Anne Mulcahy, is dismissive of affirmative discrimination concerns: “Tales of preferential treatment—along with numerical targets for women—might raise the ire of affirmative-action opponents. So be it. ‘If [somebody] wanted to write an editorial in *The Wall Street Journal*, I don’t particularly care,’ Mulcahy says.”

Companies may be assuming that some “diversity” justification in hiring and promotions will shield them from legal challenge, since the Supreme Court has accepted it for university admissions. This is not true. Statutory language makes the legal justifications for employment discrimination much weaker.

Student admission decisions are, for the most part, governed by Title VI of the Civil Rights Act of 1964, while hiring and promotion decisions are addressed by Title VII of that act. The courts have interpreted the two statutes differently, so that what is permissible under Title VI is not necessarily permissible under Title VII.

Title VII contains a categorical ban, forbidding any employer to “discriminate” on the basis of “race, color, religion, sex, or national origin” in hiring, firing or “otherwise... with respect to [an employee’s] compensation, terms, conditions, or privileges of employment.” And, unlike the situation with Title VI, the Court has not conflated Title VII with the Equal Protection Clause. Accordingly, the Court’s recent ruling in the University of Michigan cases that the latter permits discrimination in the name of “diversity” is inapplicable.

Will the courts nonetheless create a “diversity” exception to Title VII’s prohibition of racial and ethnic discrimination, as they have for Title VI? Even before a case reaches the Supreme Court, that is very unlikely.

The statute, again, admits to no exceptions. To be sure, the Court did allow racial preferences in *United Steelworkers v. Weber*, handed down in 1979, and preferences on the basis of sex in *Johnson v. Santa Clara Transportation Agency*, a 1987 decision. But the rationale the Court approved in these two cases was not based on “diversity” but on “remedying” or “redressing” past employment practices that resulted in a “manifest imbalance” of the discriminated against groups “in traditionally segregated job categories.” In 2007, and with every tick of the clock, it is becoming less and less likely that a company can plausibly assert that any imbalance, manifest or not, is traceable to “traditional[] segregat[i]on.”

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It is one thing to say that an anti-discrimination statute allows preferences in order to remedy discrimination; it is very different to say that such a statute allows discrimination so long as the employer and the courts think there is a good reason for it. There is simply no way to reconcile the latter “interpretation” with the words of the statute. (The distinction between remedial and non-remedial preferences is one that proved critical in the Court’s decisions in the Seattle and Louisville school cases, by the way.)

Note also that the Court in *Johnson* stressed that preferences could be used only to “attain” and not to “maintain” greater balance; this would make no sense if the justification is diversity. What is more, the diversity rationale is premised on a belief in racial, ethnic, and gender differences that is quite at odds with the insistence in Title VII—and by five justices of the Court—that people be judged individually, without regard to stereotypes.

If a “diversity” exception is created, it is hard to see why other exceptions might not also be put forward. Yet, in the case of Title VII, and not for Title VI, Congress explicitly declined to create even a “bona fide occupational qualification” exception to the statute for race, even as it did so for sex, religion, and national origin.

Furthermore, the diversity rationale could be—and frequently is—used to support discrimination *against* members of racial, religious, and ethnic minority groups and women. If a company’s aim is greater “diversity” and less “underrepresentation” in its workforce, this means that any group that is “overrepresented” will be on the short end of any preferential hiring or promotion. That means, depending on the company, racial and ethnic minorities and women could all lose out. It seems very unlikely that Title VII was written to allow such anti-minority and anti-female discrimination so long as an employer could adduce a business reason for it.

Does anti-minority policy in the name of diversity sound far-fetched? Xerox recently lost an employment discrimination case before the U.S. Court of Appeals for the Fifth Circuit. At issue was the company’s “Balanced Workforce Initiative,” begun “in the 1990s for the stated purpose of insuring that all racial and gender groups were proportionately balanced at all levels of the company.” The Houston office detected a racial imbalance, and so its general manager took steps “to remedy the disproportionate racial representation” there, “set[ting] specific racial goals for each job and grade level....” The Fifth Circuit found that “the existence of the [Balanced Workforce Initiative] is sufficient to constitute direct evidence of a form or practice of discrimination.” After all, “Xerox candidly identified explicit racial goals for each job and grade level,” and the evidence “indicate[d] that managers were evaluated on how well they complied with” the initiative’s objectives—an appalling company policy, and an excellent judicial decision. And here is the kicker: The plaintiffs were African-Americans, and the company had concluded that “blacks were over-represented and whites were under-represented.”

So, it is not surprising that the two federal courts of appeals—one in the Third Circuit, and one in the Fifth—that have been presented with the diversity rationale in Title VII cases have refused to accept it.

Even before the ascendancy of Chief Justice Roberts and Associate Justice Alito, it was unlikely that there would have been five votes for the diversity rationale. In 1997, when the Court had granted review in the Third Circuit case just mentioned, the civil rights establishment was so afraid of losing on this issue that it raised enough money to pay off the claims of the plaintiff and the fees of her lawyer.

It is fine for companies to celebrate their diversity—and use “affirmative action”—if that means making their workplaces attractive and friendly to as many people as possible. But it is wrong for them to aim for a predetermined racial, ethnic, and gender mix, and use preferences in order to achieve it—wrong, and illegal.

## Affirmative Action: Legally Sound And Good for American Business

By Wade Henderson\*

Corporate affirmative action makes good business sense and remains lawful under Supreme Court precedent which has been on the books for decades. American companies can rest assured: Employers have substantial latitude to use affirmative action to hire and promote a diverse workforce under Title VII of the Civil Rights Act of 1964, the law addressing race- and gender-based employment discrimination in the private sector.

Despite the recent Supreme Court ruling about school districts attempting to achieve classroom diversity through race-conscious policies, a wide range of corporate affirmative action programs remain on firm legal footing, because Congress has the final say on what private companies can do. And Congress, as the Supreme Court has recognized for thirty years, views such programs as tools to achieve Title VII’s goal of eradicating the vestiges of discrimination in the private sector workforce.

Even a Supreme Court aggressively opposed to race-conscious policies would be loath to assail the lawfulness of affirmative action under Title VII. The current Court’s most conservative members have recognized that *stare decisis* is at its high-water mark on issues of statutory interpretation, because if Congress disagreed with the Court’s interpretation of what the legislature meant it could change the statute. Congress left the door open for corporate affirmative action policies to play a role in reaching the goal of workplace fairness. Why? Because centuries of discrimination made a simple ban on conscious discrimination against women and minorities inadequate to the task of restoring racial and gender fairness in the job market. The Supreme Court observed that Congress intended Title VII as a “catalyst to cause employers and unions to self-examine and to self-evaluate their employment practices,” in order to root out the vestiges of discrimination. To this day, the residue of a long history of discrimination continues to manifest itself in the form of insidious bias in the American workplace, even though conscious discrimination is banned.

Seton Hall law professor Tristin Green observed that subtle forms of discrimination, not easily addressed by

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anti-discrimination enforcement, are an impediment to the advancement of minorities in the workplace.<sup>1</sup> African Americans and other minorities continue to face subconscious bias concerning their job qualifications, and they are often excluded from business circles that facilitate opportunities for white men. Meanwhile, the white men who have long held the great majority of top positions simply do not have to worry about unspoken devaluing of one's skills, or not being connected to the right social cliques at the office.

And studies show that a majority of both men and women in corporate offices agree that a "glass ceiling" exists for women. In other words, subtle bias—unspoken discomfort with women in supervisory roles, the lack of women in the clubby circles of management—makes it harder for women to break into various types of corporate jobs.

In the first few years following the enactment of Title VII, the prohibition of outright discrimination against women and minorities made only modest inroads into the vast gender and racial disparities in the job market. These subtle obstacles to the advancement of women and minorities were not readily overcome solely by anti-discrimination enforcement. The advent of corporate affirmative action programs beginning in the late 1970s brought about slow but sure progress.

Moreover, overcoming the continuing effects of discrimination is a decidedly good business practice. The list of companies that have implemented affirmative action programs is not limited to corporate do-gooders. As a Goldman Sachs adviser stated, "diversity is a good business practice," "there is a connection between diversity and financial success," though not always readily quantifiable.

Affirmative action programs are good for business because they offset subconscious factors affecting a company's recruiters and interviewers, often rooted in negative stereotypes or "comfort levels," rather than explicit bigotry, which result in the exclusion of highly qualified minority and female applicants. And affirmative action counteracts the exclusion of talented women and minorities from informal good-old-boys networks.

Finally, by making the effort to promote and train qualified women and minorities so that one's workforce better reflects the diversity of the labor pool, companies can foster an image and environment that appeals to the many women and minorities entering the workforce from which they hire—thus achieving a wider pool of applicants, including talented applicants of all races and genders.

Although some ideological opponents of any type of affirmative action would claim that the recent Supreme Court cases involving the use of race by government entities, including the *Parents Involved* school integration case, raise questions about corporate affirmative action, the truth is that these cases shed little light on the issue of private sector affirmative action.

Under current Supreme Court precedent, the Equal Protection Clause of the Constitution limits public sector affirmative action to cases where the entity in question has a history of discriminatory conduct—unless there is another compelling justification for the race-conscious policy. In *Parents Involved*, the Court was split, with a narrow 5-4 majority

concluding that diversity is a compelling justification for race-conscious school assignment policies where the schools did not themselves have an unremedied history of discrimination. It remains unclear whether a majority on the Court would support a diversity rationale for private actors governed by Title VII.

Ultimately, however, private employers do not need to point to diversity as a justification for race- and gender-conscious policies. The critical difference between Title VII and the Equal Protection Clause lies in the fact that under Title VII a private company can pursue affirmative action policies to correct an imbalance between its workforce and the labor pool at large, *even absent any demonstrable history of discrimination within that company*.

Given the continuing racial and gender discrepancies in many of America's business sectors, the goal of remedying such an imbalance continues to provide ample support for many corporate affirmative action policies. Whether the current Supreme Court likes such private sector policies is irrelevant; by declining to proscribe their use, Congress has tied the Court's hands.

The Supreme Court laid out the specific criteria for corporate affirmative action plans in two major Title VII affirmative action cases, *United Steelworkers v. Weber* (1979) and *Johnson v. Transportation Agency* (1987). The Court unequivocally held in those cases that Congress intended Title VII to allow voluntary affirmative action programs by private employers if they are designed to address "a manifest imbalance" in the representation of women or minorities in traditionally segregated job categories, as determined by comparing the percentage of minorities in an employer's workforce and the percentage in the qualified labor pool.<sup>2</sup> Unlike in the public sector, the company implementing the practice need not itself have engaged in any discriminatory practices which led to the imbalance.

Thus, for example, where an employer recruits nationally among college graduates and has shown that the rate of participation for a minority group or women in its entry-level workforce is conspicuously smaller than the percentage of recent college graduates from one of the respective groups, an affirmative action plan should be lawful under Title VII. Such plans are most likely to be viewed favorably by the courts when, rather than using set-asides or quotas, race and gender are used only as factors considered in a more broad-based evaluation of the individual applicant.

The Supreme Court has also held that companies may facilitate the selection of qualified minority or women employees for executive or other high-ranking positions, or for training programs for these positions, if the percentage of minorities and women in these upper-level positions is conspicuously out of balance with the percentage in the labor pool.

The contours of corporate affirmative action programs the law permits vary depending on the industry and labor pool. However, studies suggest that race and gender imbalances persist in many sectors. Across sectors, those imbalances tend to be especially pronounced in upper-level positions, even as the representation of women and minorities slowly improves at the entry level.

Using law firms as an example, recent data show that approximately 50 % of law school graduates are women and nearly 20 % are minorities. Law firm employment of women and minorities at all levels still lags behind their numbers in the qualified labor pool. At the entry level, there has been significant improvement in recent years, particularly for women. According to the EEOC, as of 2003, the number of women associates was approximately 40 %. African-American and Latino representation among associates at firms is much further behind, at approximately half the rate of their representation among law school graduates.

The contrast is even starker at higher levels. According to a 2005 National Association for Legal Career Professionals survey, only about 17 % of law firm partners are women, and less than 5 % belong to any minority group. Similar patterns exist in other industries, like finance, where EEOC data suggest that progress in participation for women and minorities has also been slow.

As the Supreme Court has recognized, the goal of corporate affirmative action programs should be to move the private sector to a place where such programs are no longer necessary. Well-designed programs are moving us in that direction but it is clear from extensive employment and education data that both the disparities and their underlying causes persist.

Corporate efforts to improve the representation of women and minorities among their employees remain legal. They are also sound business policies that offset the stubborn barriers to the participation of women and minorities in our economy, making American companies stronger and more competitive in the process. According to Jeffrey Norris, President of the Equal Employment Advisory Council (EEAC), "Affirmative action continues to be needed in employment to address the inequalities that still exist in some workplaces for women and minorities."

## Endnotes

1 Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. Rev. 91 (2003).

2 The Supreme Court offered little guidance to elucidate what kinds of job categories can be considered "traditionally segregated." The Court appears to consider the manifest imbalance in gender or minority representation to be itself evidence of traditional segregation, which makes sense given the body of evidence demonstrating that these imbalances continue to emanate from both explicit and structural discrimination.

